IN THE

SUPREME COURT OF THE UNITED STATES

Nos. 76-180; 76-183; 76-5193 and 76-5200

JAMES DUMPSON, Individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, Individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, Individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, Individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, Individually and as Executive Director of the NEW YORK STATE BOARD of SOCIAL WELFARE; ABE LAVINE, Individually and as Commissioner of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; and JOSEPH D'ELIA, Individually and as Commissioner of the NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES,
Appellants-Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO; on Behalf of Themselves and All Others Similarly Situated,
Appellants-Intervenors,

DANIELLE and ERIC GANDY; RAFAEL SERRANO; and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on Behalf of Themselves and All Others Similarly Situated,
Appellants-Plaintiffs,

Against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH; RALPH and CHRISTIANE GOLDBERG; and GEORGE and DOROTHY LHOTAN, on Behalf of Themselves and All Others Similarly Situated,
Appellees.

Appeal from the Judgment of the United States District Court
for the Southern District of New York

AMICUS CURIAE BRIEF

MICHAEL WOLFF
PAUL PIERSMA
National Juvenile Law Center
St. Louis University School of Law
3701 Lindell Boulevard
St. Louis, Missouri 63108
Attorneys for Amicus Curiae

PATRICIA CONNELL
STEPHEN D. SMITH
ADRIENNE E. VOLENIK
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Juvenile Law Center, a project of St. Louis University School of Law, is a national legal services support center, funded by contract with the Legal Services Corporation.

The function of the Center is to provide assistance to clients eligible under the guidelines established by the Legal Services Corporation Act of 1974 in the area of juvenile and family law. The attorneys employed by the Center also act from time to time as *amicus curiae* in cases involving issues of substantial public interest and importance which affect the rights of indigent children and their parents.

The National Juvenile Law Center takes an interest in this case because of the importance to both the poor child and his parent of the procedures surrounding the foster care system. In addition, *amicus* belives that the issues before this Court are substantial, critically affecting both the public interest in providing good substitute care for children removed from their natural homes and the child's interest in receiving the best care possible.

Counsel for *amicus* are familiar with the questions involved in this case and believe that it is essential that an additional argument, advocating neither of the polar positions presented by the parties, be brought to the attention of this Court.

Amicus has requested and obtained the written consent of all parties to file this brief.

SUMMARY OF THE ARGUMENT

It has long been recognized that parents and children have constitutionally protected rights and interests. This Court has consistently recognized and protected parental rights to the care, custody and control of their children, and the right to familial privacy. While the rights and interests of children have not often been before this Court, when presented, the constitutional claims of children have been recognized. Having established that both parents and children have protected interests, it becomes necessary to define the nature of the process mandated

to protect those interests. This determination must be made after examining the particular context in which the claim is raised.

New York has created a statutory system for the identification and protection of neglected children. One phase of this system involves the use of foster care placement for children judicially declared neglected or voluntarily placed with the agency by parents. A decision of a state agency to terminate foster care placement and return the child to the natural parents is made according to statutory procedures, which are adequate and comport with due process concepts in those situations in which the decision is made.

However, the statutory procedure is deficient and fails to protect the parties' interests when the decision is one to transfer a child from one foster home to another.

INTRODUCTION

Amicus hopes in this brief introduction to acquaint this Court with some of the principle characteristics of the foster care system. It is a system which has existed much like an arm of the juvenile courts providing the care which juvenile statutes mandate without itself receiving significant statutory or judicial recognition. The system operates by contracting with a natural parent to provide care for his child and then contracting with a foster parent for the provision of those services. Any change in the existing relationship affects the interests of all of the parties.

This suit was originally filed on behalf of foster parents and foster children who asserted an interest in being afforded a hearing prior to the child's removal from his foster home. The district court in this case rejected the foster parents' expectation

of continued care of the foster child and declined to rule on their entitlement to assert the constitutional protections afforded the traditional biological family. *Organization of Foster Families, etc. v. Dumpson*, 418 F. Supp. 277, 280-281 (S.D.N.Y. 1976). Since that holding of the court has not been appealed, *amicus* has omitted any significant discussion of the rights and interests of the foster parents. This is not to imploy that such rights have not been recognized by courts and legislatures but only to indicate that they are not currently before this Court.

Although foster care dates back to ancient times and has long been a part of Anglo-Saxon, Welsh and Irish culture, the practice today in America differs significantly from the early foster care concepts. Foster care in this country was developed in response to evils such as infant mortality, intellectual retardation, and sociological and psychological maladjustment that existed in large child care institutions. Over the years the number of children in foster care has increased steadily and early estimates indicated that by 1975 4.7 children out of every 1000 would be participating in this form of substitute parental care. S. Low, *Foster Care of Children—Major National Trends and Prospects, U.S. Department of Health Education and Welfare* 1-2 (1966).

A child may enter the foster care system either involuntarily following an adjudication of neglect by a court, or voluntarily subsequent to the parent executing an entrustment agreement with an agency. This latter practice has currently come under sharp attack because it allows a social worker to substitute his judgment for that of an impartial hearing officer. *See* Levine, *Caveat Parens: A Demystification of the Child Protective System*, 35 U. Pitt. L. Rev. 1, 23-29 (1973); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1006-1007 (1975); Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights under the Due Process Clause*, 4 Suffolk L. Rev. 631, 645-664 (1970).

Despite the apparent inequity of allowing a social worker to make crucial decisions regarding a child's family environment, estimates indicate that as many as half of the children in foster care are there under voluntary agreements. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L. J. 887, 921-22 (1975); Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Educ. Rev. 600, 601 (1973). One commentator goes so far as to place the number at 90% for the state of Pennsylvania. Levine, *supra* at 29.

The foster care system is designed to provide temporary placement for the child who is not receiving adequate care from his biological parents. The theoretical goals of the foster program have been expressed by the Child Welfare League of America in its *Standards for Foster Care Service* (1959):

> The ultimate objectives of foster care should be the promotion of healthy personality development of the child, and amelioration of problems which are personally or socially destructive.
>
> Foster family care is one of society's ways of assuring the well-being of children who would otherwise lack adequate parental care . . .
>
> Foster family care should provide, for the child whose own parents cannot do so, experiences and conditions which promote normal maturation (*care*), which prevent further injury to the child (*protection*), and which correct specific problems that interfere with healthy personality development (*treatment*). Foster family care should be designed in such a way as:
>
> to maintain and enhance parental functioning to the fullest extent;
>
> to provide the type of care and services best suited to each child's needs;

> to minimize and counteract hazards to the child's emotional health inherent in separation from his own family and the conditions leading to it;
>
> to make possible continuity of relationship by preventing replacements;
>
> to facilitate the child's becoming part of the foster family, school, peer group and larger community;
>
> to protect the child from harmful experiences;
>
> to bring about his ultimate return to his natural family whenever desirable and feasible.

Id. at 6-7.

To implement these goals, foster care services must develop procedures and practices to govern internal operation. The agency's procedures relating to the transfer of children either from one foster home to another or from a foster home back to the child's natural parents are the subject of this litigation.

ARGUMENT

I

Parents and Children Have Fundamental Rights and Interests Protected by the Due Process Clause of the Fourteenth Amendment in the Preservation and Restoration of the Family Unit and in the Welfare of Its Members.

A. Fundamental rights and interests are protected by the Due Process Clause.

Whether or not due process is required in a particular context depends upon the existence of a right or interest that is entitled to protection. While the Constitution states that no person shall be deprived of life, liberty, or property without due process, this Court has recognized that there exist a variety of interests that are "difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 710 (1976). Among these are the rights of individuals in matters relating to family life and child rearing. *Stanley v. Illinois*, 405 U.S. 645 (1972).

In addition to protecting rights that stem from the Constitution, due process also protects those rights and interests that are created and defined by statute or rule. *Goss v. Lopez*, 419 U.S. 565 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The rights and interests of both the parents and the children involved in the case before this Court are not only fundamental within the meaning of the due process clause, but are also recognized by the State of New York.

B. **Parents have a fundamental right to the care, custody and control of their children.**

The scope of parental rights is nowhere exhaustively defined; however, it is frequently recognized as including the right to the care, custody and control of the child, the right to discipline the child, and the right to control his religious and moral education. These rights are not to be disturbed by the state so long as the parent discharges certain obligations to provide for the child's support, maintain his health, and ensure his education and welfare.

The Constitution has been interpreted to prevent state interference in family life in a number of contexts. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court defined the "liberty" protected by the fifth and fourteenth amendments to include the right to marry, establish a home and bring up children, and therefore concluded that a statute forbidding the teaching of the German language infringed upon the parental right to choose an education for one's child.

The Supreme Court of the United States has frequently emphasized the importance of the parents' right to the companionship, care, custody and management of their children. This right has been deemed "essential," *Meyer v. Nebraska*, 262 U.S. at 399, recognized as one of the "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and deemed "far more precious . . . than property rights", *May v. Anderson*, 345 U.S. 528, 533 (1953). In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court stated:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Id. at 166.

Most recently this Court invalidated mandatory leave provisions for pregnant school teachers because these provisions unnecessarily interfered with the decision to raise a family. This Court observed that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 639-40 (1974). See *Wisconsin v. Yoder* 406 U.S. 205 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The basic integrity of the family unit is protected not only by the due process clause of the fourteenth amendment to the United States Constitution, *Meyer v. Nebraska*, 262 U.S. at 399, but also by the equal protection clause of the fourteenth amendment, *Skinner v. Oklahoma*, 316 U.S. at 541, and the ninth amendment, *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court discussed the relevance of many of these cases to the abortion question. This Court noted that while privacy is not explicitly mentioned in the Constitution, a right to a "guarantee of certain areas or zones" of privacy has been constitutionally recognized to include those rights that are "implicit in the concept of ordered liberty," such as "activities relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education." *Id.* at 152-153. (Citations omitted). Although basing its decision on a right to privacy, this Court also stated its belief that the privacy right is "founded in the Fourteenth Amendment's concept of personal liberty." *Id.* at 153.

The importance of these fundamental rights and the constitutional protections afforded them was summarized in *Stanley v. Illinois*, 405 U.S. 645 (1972), when the Court stated:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." [Citations omitted].
>
> * * * * * * * *
>
> The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. [Citations omitted].

Id. at 651.

State courts, also recognizing the primacy of the parents' right to control their children, have found these rights protected by the due process clause of the fifth and fourteenth amendments. Due process has been interpreted to include the right to a free transcript and counsel for an appeal of a termination order, *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976); the waiver of filing fees and the provision of a free transcript for an indigent in a dependency appeal, *Appeal in Pima County Juvenile Action No. J-46735 v. Howard*, 112 Ariz. 170, 540 P.2d 642 (1975); the right to court appointed counsel at a dependency hearing, *In re Welfare of Myricks*, 85 Wash. 2d 252, 533 P.2d 841 (1975); the right to counsel at removal hearings, *Danforth v. State Department of Health and Welfare*, 303 A.2d 794 (Me. 1973); and the right to counsel for indigents in neglect hearings, *In re Ella B.*, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972).

This constitutional basis for parental rights is reinforced by the traditional notion that a child's parents will love it most and care for it best. *Moody v. Moody*, 211 So.2d 842 (Miss. 1968). Many state courts in neglect and dependency hearings have expressed this preference for placement of children with their natural parents, *In re Raya*, 255 Cal. App. 2d 260, 63 Cal.

Rptr. 252 (1967); *In re Hudson*, 13 Wash.2d 673, 126 P.2d 765 (1942). This preference has also been recognized in custody disputes, *Turner v. Pannick*, 540 P.2d 1051 (Alas. 1975); *Reynardus v. Garcia*, 437 S.W.2d 740 (Ky. 1968); and in adoption proceedings, *In re Adoption of Farabelli*, — Pa. —, 333 A.2d 846 (1975); *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 113 N.E.2d 801 (1953).

It is clear beyond doubt that the rights and interests that a parent has in the care, custody and control of his children are fundamental, stemming as they do from the fifth, ninth and fourteenth amendments. Because of the fundamental nature of the rights involved, due process protections of the fourteenth amendment must be afforded parents before their rights may be abridged.

C. Children have a highly protected interest in adequate physical, mental and emotional development.

Prior to the landmark decision of *In re Gault*, 387 U.S. 1 (1967), it was commonly accepted that children had no rights —only duties:

> The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions . . . the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.

Id. at 17. The Court pointed out the potential for abuse inherent in this right-to-custody approach, however benevolently motivated, and stated that "neither the Fourteenth Amendment

nor the Bill of Rights is for adults alone." *Id.* at 13. While *Gault* is indisputably the most important decision to date adjudicating the rights of juveniles, the Supreme Court specifically cautioned that it was not considering the impact of the Constitution on the entire delinquency process. It was left to later cases to more fully develop the boundaries of the constitutional protections afforded minors in delinquency cases. *In re Winship*, 397 U.S. 358 (1970), held that proof of guilt must be shown beyond a reasonable doubt in delinquency hearings; but fundamental fairness does not mandate the provision of jury trials for juveniles. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The double jeopardy protection was extended to juveniles in *Breed v. Jones*, 421 U.S. 519 (1975).

This Court has considered the rights of children outside the delinquency context in a number of school cases. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the first amendment was held to safeguard the right of minor students to wear armbands as a means of political protest. Avoiding an extended discussion of the point at which a minor's interests are protected, the court stated simply:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

393 U.S. at 511.

The Court has also afforded children due process rights in the school setting. *Goss v. Lopez*, 419 U.S. 565 (1975). The state-created statutory right to a free education was held to ripen into both a liberty and property interest under the due process clause of the fourteenth amendment. As a consequence students could not be suspended from public schools without notice of the charges and an opportunity for a hearing.

The opinions of this Court in these school cases do not address the differences between rights accorded juveniles and adults. Mr. Justice Stewart, in his concurring opinion in *Tinker*, expressed some dismay at this omission, since the Court had just reiterated the principle that states possess broader regulatory authority over children than adults in *Ginsberg v. New York*, 390 U.S. 629 (1968).

Most recently this issue was given particular attention in *Planned Parenthood of Central Missouri v. Danforth*, — U.S. —, 96 S.Ct. 2831 (1976). This case presented the constitutionality of a statute requiring the consent of a parent before an abortion may be performed on an unmarried woman under eighteen years of age. The Court, citing many of the children's cases already mentioned, first recognized the constitutional basis for the right being asserted:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

96 S.Ct. at 2843. The Court then balanced the state's interests in requiring parental consent against a minor's right of privacy:

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

Id. at 2844. The words "mature minor" place a clear limitation on the holding which is made explicit in a later paragraph:

> We emphasize that our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.

Id.

From a reading of these decisions it is clear beyond a doubt that children do possess constitutionally protected interests and rights. At times the rights of the parent may overshadow these interests, but such conclusions can be reached only after an examination of the importance of the right or interest in question.

In addition to the number of Supreme Court cases deciding children's issues, lower federal courts and many state courts have contributed significantly to the expansion of children's rights. *Shone v. State of Maine*, 406 F.2d 844 (1st Cir. 1969), held that transfer of a juvenile from a training center for delinquent youth to an adult correctional facility, without provision of the procedural safeguards afforded minors committed directly to the adult institution, violated due process and equal protection of the law. In *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (R.I. 1972), the court employed the same constitutional basis in enjoining the incarceration of juveniles in one particularly anti-rehabilitative wing of the delinquency facility. The opinion additionally prohibited the use of the solitary confinement rooms as a violation of the eighth amendment's ban against cruel and unusual punishment. Due process was also found to attach at the preliminary detention stage in *Doe v. State*, 487 P.2d 47 (Alas. 1971). The case went on to require that detention be based on sworn testimony, and that the order contain a statement of the facts on which it was based. The right to be present at the disposition stage of a Person in Need of Supervision proceeding was found to be protected by the due process clause in *In re Cecilia R.*, 36 N.Y. 2d 317, 367 N.Y.S.2d 770, 327 N.E.2d 812 (1975).

It is not surprising that state courts have begun to evidence concern for the rights and interests of minors since they have long taken an interest in their welfare. Traditionally the state served as an arbiter in custody disputes between parents, considering the "best interests of the child" in making its decision. More recently courts have recognized that minor children in

divorce proceedings may have interests independent of the parent in the outcome of the litigation. To fill this gap, courts and legislatures have acted to provide for the appointment of an attorney or guardian *ad litem* to represent the interests of the child. *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974). *See Zinni v. Zinni*, 103 R.I. 417, 238 A.2d 373 (1968); *Wendland v. Wendland*, 29 Wisc.2d 145, 138 N.W.2d 185 (1965). Not to recognize their rights and interests would be to treat children as chattels, to be divided between the divorced parties like a pair of shoes.

Commentators have uniformly rejected this view and have consistently argued for increased representation in all proceedings effecting the eventual placement of minors. Comment, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 Hastings L. J. 917 (1976); Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (1973); Inker and Perretta, *A Child's Right to Counsel in Custody Cases*, 5 Fam. L. Q. 108 (1971); Klienfield, *The Balance of Power Among Infants, Their Parents and the State*, 4 Fam. L. Q. 320 (1970).

Neglect and termination statutes currently evidence a primary concern for protecting the interests of children. New York's statute enumerates the safeguarding of their physical, emotional and mental well being, and the establishment of procedures to protect them from injury or mistreatment as two of its major goals. N.Y. Fam. Ct. Act § 1011 (McKinney 1975).

New York is not alone in its statutory assertion of the child protective interest. Practically every state has a purpose clause similar to the New York statute. See Katz, Howe, and McGrath, *Child Neglect Laws in America*, 9 Fam. L. Q. 1 (1975), for a survey of child neglect laws. In addition, every state has made provision for reporting of child abuse. *See, e.g.*, Paulsen, *The Legal Framework for Child Protection*, 66 Cal. L. Rev. 679

(1966). Finally, welfare statutes and regulations and mandatory school attendance laws are other expressions of the child protective interests by the states.

There can be no doubt that today the rights and interests of children are being recognized at an ever increasing rate. Some judges and commentators have gone so far as to develop a compendium of rights to be afforded children. *See, e.g., O'Shea v. Brennan*, — App. Div.2d —, 387 N.Y.S.2d 212 (1976); Foster and Freed, *A Bill of Rights for Children*, 6 Fam. L. Q. 343 (1972).

Although this Court has made no definitive pronouncement acknowledging a child's right to the preservation and maintenance of an adequate family unit as stemming from the Constitution, it has most certainly implied it. Recognizing that a parent's rights are fundamental, this Court has concluded that the "integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . ., The Equal Protection Clause of the Fourteenth Amendment . . ., and the Ninth Amendment." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted). This integrity is as much an interest and right of the child as it is of his parent. He suffers a loss as grievous as that suffered by his parent when that unit is dissolved or altered. For these reasons, his interests must also be protected by the due process clause.

However, whether or not this Court views a child's interest in family integrity as stemming from the Constitution, that interest must ultimately be entitled to due process protection. New York's ever increasing recognition, both by the legislature and by the courts, of the rights of a child to a healthy and stable home environment mandates this conclusion. Insofar as the state has created these rights, it cannot subsequently interfere with them without providing due process safeguards.

II

Procedures Necessary to Assure Due Process Will Vary in Accordance With the Rights and Interests to Be Protected.

A. A determination of what process is due requires a three factor analysis.

Having established in Part I that both parents and children have rights and interests protected by the due process clause, it becomes necessary to define the nature of the process mandated to protect those rights, recognizing that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

This Court recently articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), specific guidelines for identifying required due process:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

Analyzing earlier decisions in light of these factors leads to several conclusions. First, the more fundamental the right or interest threatened, the greater the probability that due process will require a hearing prior to a deprivation. In *Goldberg v.*

Kelly, 397 U.S. 254 (1970), for example, this Court required a hearing prior to the termination of welfare benefits because of the possibility that an eligible recipient might be deprived of the means to live without due process. On the other hand, the temporary deprivation of disability benefits, not awarded on the basis of financial need, was considered a less serious loss and one not warranting a hearing prior to the deprivation. *Mathews v. Eldridge*, 424 U.S. at 349.

Second, if an erroneous deprivation may be both long in duration and result in serious consequences, then a hearing may be required prior to the deprivation. *Id.* at 342.

Third, if the existing administrative procedures are unreliable or unfair, additional procedural safeguards should be implemented. The following are to be considered in making this assessment: whether the necessary inquiry involves investigation and analysis of highly subjective information; whether the information is available from reliable sources; and whether there is a substantial risk of error in the truth finding process as it exists. *Id.* at 343-347. Where, as in *Mathews*, existing procedures are deemed sufficient to guard an important right, due process will not require the initiation of additional procedures.

Fourth, the more basic the interest involved, the more complex the required hearing will be. For example, a welfare recipient, faced with a possible loss of livelihood, was entitled to:

> timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Goldberg v. Kelly, 397 U.S. at 267-268. That a less serious deprivation results in fewer due process protections is illustrated in *Goss v. Lopez*, 419 U.S. 565 (1975). There a relatively brief interference with the right to an education, suspen-

sion of ten days or less, was held to require that a student be given "oral or written notice of the charges and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581.

Finally, protecting financial and administrative concerns is generally considered less important than providing adequate protection of fundamental rights. Where consideration of both interests conflicts, the latter will generally prevail. If, however, the state's legitimate interests are, on a comparative basis, as important as those asserted by an individual or group, the process required to protect those interests may be minimal. *See, e.g., Goss v. Lopez*, 419 U.S. at 581, in which a student's right to an education was balanced against the school system's interest in maintaining discipline coupled with the possibility of an overwhelming administrative burden.

A conflict in rights and interests of the parties to this litigation may arise when any of three situations is contemplated: a return to the natural home of a child placed voluntarily in foster care; a return to the natural home of a child placed under court order; or a placement in a different foster home of a child placed voluntarily or involuntarily. Only after a thorough consideration of the rights and interests of the natural parents, the children and the state can an accurate assessment of the procedures mandated by due process be made.

B. Current New York procedures for a return to the natural home of a child placed voluntarily in foster care comport with due process.

The state may decide at any time to return a voluntarily placed child to his natural parents. Such placements are made by mutual agreement between the parents and the agency for the purpose of providing care for the child during a period when the parent is unable to fulfill his duties. When both par-

ties agree that the parent is once again ready to assume these obligations towards the placed child, the reason for state involvement ceases and the parties should be returned to their former positions. This occurrence has no prejudicial effect on a parent but rather serves to fulfill his right to the care, custody and control of the child. Unfortunately the same cannot be said for the child, since his interests may or may not be served by such a move. While the child's interest remains in receiving adequate care, there is no guarantee that the return to the natural home will serve this purpose.

Functioning between this clash of two possibly competing interests one sees the interests of the state exercised through the case worker's actions. It is the decision of the social worker, based on training, experience and knowledge of the situation, which prompts the movement of the child. If the risk of an erroneous determination by the caseworker is slight there is a reduced interest in providing due process protections.

There are a number of factors which lead one to believe that an agency approved reunification of a family will only occur after there is ample evidence that the parent can adequately meet the child's need for care. Since social workers are often white, middle-class and unmarried or childless, the values of the worker and his clients may diverge sharply. Values learned by middle class America simply have no application where the pressure is for survival. This can result in the case worker setting goals and expectations which the parent not only sees as hopeless but often unrealistic. Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1, 13-19 (1973). Thus the period of separation of a child from his parents may be prolonged until the parents' values measure up to those of the social worker.

In many instances a financial disincentive to terminate foster care may exist. Michael Wald in his article, *State Intervention*

on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 679 (1976), describes the sitation in New York City where the agency is compensated substantially while the child is in foster care. If the child is removed from this form of care, however, payments cease although the agency must continue to provide services.

The typically large caseloads and high rates of turnover among social agency personnel may delay any attempt at reunification of the family since it usually takes more time to return a child to his home than to retain him in foster care. Each new caseworker must familiarize himself with the child and his family before making any decision and this can take much time.

Although the foster parent's interests are not before this Court, they may likewise exercise a force for insuring a proper review of the situation. The foster parents may request a conference with the agency before the removal occurs, or instead employ a post-removal fair hearing and later judicial review. 18 N.Y.C.R.R. 450.10 (formerly 450.14).

Since all four of these factors militate heavily against a decision to return the child to his parent, when the return is finally authorized it seems certain that the state has given every possible consideration to the interests of the child in receiving adequate care.

The likelihood of additional proceedings adding anything valuable to the decision-making process is slight. Since the credibility of a particular interested party is not usually the basis for the determination, the necessity for adversarial procedures is lessened. Instead, the routine documentation prepared by the case worker is relied upon to support the decision to return the child.

Having considered the interests of both child and parent one must now consider the state's interest in these decisions. While the state may act to provide care for the child and to strengthen the family unit, the relevant concern in this context is the preservation of scarce state resources. It seems clear that the imposition of additional procedures prior to returning a child would add little to this situation and place weighty burdens on overworked staff and under-financed agencies.

Because of the substantial agency interests in continued foster care *Amicus* believes that the decision to move a child from foster care to his parent's home is based upon a thorough and penetrating investigation of the adequacy of the natural home and thus current New York practices comport with due process requirements.

C. **Current New York procedures for a return to the natural home of a child placed under court order comport with due process.**

Interests of these parties are also brought into conflict when a child placed with an agency subsequent to a court adjudication of neglect is to be removed from foster care and returned to his natural parents. The major factor that distinguishes this situation from the previous situation is the fact that the court has determined that the child should be removed from his parents because they were deficient in properly providing for him.

In this situation, however, the child's interest in obtaining adequate care should be more closely scrutinized since in the past an impartial judge had found that interest sufficiently imperiled to justify the child's removal from his natural home. Consequently, the child is not merely asserting a general right to care but rather an interest in protection from a harm which previously justified his removal from the home.

The parent's interest in his child's care, custody and control is not reduced because there has been a prior adjudication of neglect. However, the presumption that the parent is best able to care for the child has been rebutted by the court's adjudication. While the parent's interest in a quick return of the child remains viable, it is overshadowed by the child's interest in continued protection.

Procedures currently in existence adequately safeguard the interests of both parent and child by requiring that the committing court or non-agency official consent to the return of the child. N.Y. Soc. Serv. Law § 383(1) (McKinneys 1966). The official who previously found the child in need of substitute care is in a unique position to give proper consideration to the heightened interests of the child.

Current procedures also require that prior to agency initiation of the return of a child to his natural parents, both the agency and the committing authority must agree that such action will be in the best interests of the child. Adding another hearing would serve little purpose in protecting the child and might in fact be detrimental to both parent and child by delaying their ultimate reunion.

An additional hearing, from the state's point of view, would do little to improve the "correctness" of the decision and would significantly increase administrative burdens. When the probable value of the additional safeguards offers little to offset the disadvantages they entail, additional due process protections will not be mandated.

D. **Due process requires that biological parents and foster children be afforded an opportunity for hearing prior to a transfer of the child from one foster home to another.**

A child may enter the foster care system either through a voluntary agreement executed by his parent or by court order,

made subsequent to an adjudication of neglect or dependency. In either case the child will be placed in a foster home subject to removal to a different placement at the whim of the agency.

Significant rights and interests of both parent and child are also affected when an agency makes a decision to transfer a child from one foster home to another. Although these interests are similar to ones involved in the two situations already discussed, some additional considerations must be evaluated.

Unless the natural parent's right to the care, custody and control of his child has been terminated by court order, the parent retains an important interest in the restoration of family integrity. This interest may be adversely affected by the agency decision either to extend the existing foster placement or to effectuate a transfer to another foster home. The physical proximity of the natural parent to his child may play an important role in maintaining the bonds of affection between the two. The continuing existence of this bond may be the basis for a return of custody to the parent. Even when this is not the result, the existence of the bond may be the one factor that prevents an effort to terminate parental rights from being successful.

Additionally, the placement decision may adversely affect a parent's fundamental interest in the care, custody and control of the child because of the character of the foster parent who assumes custodial responsibility for the child. The foster parent, in pursuit of his own ends, may make visitation difficult for the natural parent, may attempt to adversely influence the child's attitudes toward the natural parent, and may actively initiate steps to gain legal custody of the child.

As the duration of a placement with a foster family lengthens, the ultimate goal of returning the child to the natural parent is threatened. The longer the period a child spends with one

Foster family, the smaller the likelihood that an agency will authorize return of the child to the natural parent.

Thus, the right of a parent to the care, custody and control of his child is almost certain to be adversely affected when an agency resolves the question of whether to make a change in foster care placement.

Whether a child enters the foster care system voluntarily or under court commitment, he has a significant interest in securing care adequate to insure his physical, mental and emotional well-being. When the agency decides to exercise its discretion by moving the child from one placement to another it must deterfmine that the child's right to adequate care will be fulfilled in the second foster home. The duty of the agency is partially met by requiring that the foster parents and their home have complied with all state licensing regulations. In addition, an individual study should be made to guarantee that the care provided by the placement is adequate for the needs of the child.

When the parent maintains a strong bond with the child and works to reestablish a suitable home situation for him, the foster care arrangement should be structured as an interim home, maximizing parental involvement with the child. The interests of both parent and child are served by efforts to assist the parents in preparing for a return of their child.

Conversely, in instances where foster care has become a long term placement with minimal or non-existent natural parent contact, the child's interest in securing adequate care is best served by the least disruptive placements. The nature of the care provided by state child care agencies has recently come under attack as failing to meet the child's need for emotional stability. Levine, *Caveat Parens: A Demystification of the Child Protective System*, 35 U. Pitt. L. Rev. 1, 19-22 (1973); Wald, *State Intervention on Behalf of "Neglected" Children: Stand-*

ards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 643-648 and 667-676 (1976).

Vincent DeFrances, Executive Director of the Children's Division of the American Humane Association warns us of the dangers of modern foster care systems:

> For a few victims of neglect, replacement away from home may be the first step towards life in a new, permanent, and rewarding setting. For many children, however, it becomes a prelude to a series of displacements from foster home to foster home, with each new dislocation leaving another scare on an already damaged personality. DeFrancis, *Child Protective Services—A Community Process* (1964).

Writers in the area of child welfare are unanimous in their assertions that continuity in relationships, surroundings and environment is essential to the child's normal development. *See* Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*, 31-39 (1973).

When a social services official proposes to transfer a child from one foster care placement to another he is required, under existing procedures, to notify the foster parent of his intent. Upon receipt of that notice the foster parent may request a conference at which he may submit reasons why the child should not be removed from his custody. 18 N.Y.C.R.R. § 450.10.

Additionally, agency regulations entitle the foster parent to have the proposed action reviewed at this conference. Significantly, neither the child nor the natural parent is notified of or represented in this procedure, despite their important individual interests in the decision of the agency.

Unlike the situation discussed in Parts IIB and IIC of this brief, the transfer of a child between foster families involves no systematic checks that would, even inadvertently, protect the interests of either the child or the natural parent in transfers from one foster home to another.

Damage to the interests of children and their parents would be minimized if the agency official initiating the transfer were required to justify his action by showing that the transfer would 1) enhance the quality of care provided the child; 2) contribute to the long range development of the child's physical, mental, and emotional well-being, and 3) further the eventual return of the child to the natural parent consistent with the progress of the parent in his efforts to reestablish the home.

To assure that these considerations are addressed, due process requires that the rights and interests of the parent and the child be given, at a minimum, the same protections afforded a foster parent. These would include written notice by the social services official of the intention to remove a child from his foster family at least ten days prior to the proposed removal date, the right upon request to a conference with the social services official at which the parent and child can appear with a representative to review the proposed action, be informed of the reasons for the change, and be allowed to espouse a position different from the agency position. Notice of the conference must be given at least five days before it is to occur, written notice of the decision is required within five days after the conference, and finally, the decision may be appealed to the social services department. 18 N.Y.C.R.R. § 450.10. An important additional requirement should be the appointment of counsel for a child who is too young to recognize and articulate his interests.

Since this procedural framework already exists for the benefit of foster parents, an extension of these protections to children and their parents would entail minimal new burdens on the state.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to reverse the judgment of the district court and order entry of judgment consistent with the foregoing analysis.

Respectfully submitted,

MICHAEL WOLFF

PAUL PIERSMA

By MICHAEL WOLFF
Attorneys for Amicus Curiae
National Juvenile Law Center

Certificate of Service

I, Michael A. Wolff, Counsel for Amicus Curiae, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date, November 26, 1976, three copies of Brief of Amicus Curiae to the following persons: Leonard Koerner, Assistant Corporation Counsel of the City of New York, Counsel for New York City Appellants, at Municipal Building, New York, New York 10007; Mark C. Rutzick, Assistant Attorney General, Counsel for Appellants Shapiro and Lavine, at Two World Trade Center, New York, New York 10047; Louise Gruner Gans, Community Action for Legal Services, Inc., Counsel for Appellants Rodriquez, Robins, Shabazz, and Collazo, at 335 Broadway, New York, New York 10013; Helen L. Buttenwieser, Counsel for Appellants-Plaintiffs Danielle and Eric Gandy, Rafael Serrano, and Cheryl, Patricia,

Cynthia and Cathleen Wallace, at 575 Madison Avenue, New York, New York 10022; and Marcia Robinson Lowry, Children's Rights Project, New York Civil Liberties Union, Counsel for Appellees, at 84 Fifth Avenue, New York, New York 10011. I further certify that all parties required to be served in this appeal have been served.

MICHAEL A. WOLFF
Counsel for Amicus Curiae